

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 11, 2014

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| UNITED STATES OF AMERICA, |) | |
| Complainant, |) | |
| |) | |
| v. |) | 8 U.S.C. § 1324a Proceeding |
| |) | OCAHO Case No. 13A00023 |
| |) | |
| M & D MASONRY, INC., |) | |
| Respondent. |) | |
| _____ |) | |

FINAL DECISION AND ORDER

Appearances:

Abby L. Meyer
For the complainant

Robert E. Banta
For the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint in two counts alleging that M&D Masonry engaged in three hundred and sixty-four violations of 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that M&D failed to ensure that two hundred seventy-seven named individuals the company hired properly completed section 1 of Form I-9 and/or failed itself to properly complete section 2 of the form. Count II alleged that the company failed to prepare and/or present the forms for eighty-seven named employees. M&D filed a timely answer denying the material allegations and specifically challenging forty of the two hundred seventy-seven violations alleged in Count I and six of the eighty-seven violations alleged in Count II. M&D raised six affirmative defenses.

The first defense asserts that ICE relies on policies as to substantive versus technical/procedural violations and I-9 enforcement that were developed in secret without the notice and comment required by the Administrative Procedure Act. The second defense says ICE's claims are barred in whole or in part because the government's practices violate the Small Business Regulatory

Enforcement Fairness Act of 1996. M&D's third defense alleges that ICE's practices with respect to technical and procedural violations are arbitrary and capricious, and its regulations do not adequately define good faith; the fourth defense says the implementation of ICE's enforcement matrix was ultra vires; the fifth says the fines are excessive and do not take into account the company's ability to pay; and the sixth says ICE's methodologies for enforcement are arbitrary and capricious.

Prehearing procedures were completed, and on January 6, 2014, ICE filed a motion to amend its complaint to withdraw twenty-five of the contested allegations in Count I. The government acknowledged that the company provided sufficient evidence to show that those twenty-five employees were terminated prior to the inspection, and did not come within the scope of the audit. M&D concurred in the withdrawal of those allegations and the motion was granted in an order dated January 28, 2014, leaving two hundred fifty-two violations alleged in Count I. Presently pending is the government's motion for summary decision. M&D filed a response in opposition and the motion is ready for resolution.

II. BACKGROUND INFORMATION

The affidavit of Mike Weldon reports that M&D Masonry, Inc. was incorporated in Georgia in 1992 by Weldon and his brother David, and that the two have since that time been the company's co-owners and co-operators. Weldon characterizes M&D as a "family business," noting that in addition to the two brothers, several of their sons work or have worked for the business, which provides masonry contractor services for projects throughout the state of Georgia. The record reflects that M&D has its principal place of business in Barnesville, Georgia.

A newspaper article appeared in the Atlanta Journal Constitution on April 30, 2010 under the headline, "Illegal hiring for airport construction?" The article quoted a hiring foreman for M&D as saying that the company was employing workers on a job at the airport knowing they lacked valid employment authorization. ICE's Homeland Security Investigations Office then instigated a worksite enforcement investigation on May 7, 2010. ICE served M&D with a Notice of Inspection (NOI) seeking I-9 forms for the company's current and terminated employees for the period May 7, 2007 until May 7, 2010, as well as for employment records, payroll data, wage and hour reports, and other information. The company presented three hundred forty-two I-9 forms, together with other documents. ICE issued the company a Notice of Technical and Procedural Failures (NTPF) on August 31, 2010, together with a Notice of Suspect Documents (NSD). M&D presented fifty-six corrected forms in response on September 14, 2010 and also advised ICE that forty-three of the individuals on the NSD no longer worked for the company. The government issued a Change to Notice of Inspection Results on October 13, 2010, and served a Notice of Intent to Fine (NIF) on May 17, 2012. M&D filed a timely Request for Hearing on June 12, 2012 and all conditions precedent to the institution of this proceeding have been satisfied.

III. THE POSITIONS OF THE PARTIES

A. The Government's Motion

The government noted that it had previously withdrawn its allegations as to the employees designated in Count I of the complaint as nos. 121, 137, 143, 147, 151, 157, 160, 161, 164, 169, 171, 173, 176, 182, 192, 199, 201, 203, 223, 241, 243, 246, 247, 250, and 262. ICE's motion contends that there is no genuine issue of material fact as to liability for the three hundred thirty-nine violations remaining in the amended complaint, and seeks a penalty in the amount of \$332,812. The government points out that the company's answer failed to deny two hundred thirty-seven of the violations originally alleged in Count I and eighty-one of the eighty-seven violations alleged in Count II, thereby conceding these violations.

As to the violations in Count I, ICE provided a chart showing each of the specific violations and summarized the multiple types of substantive violations shown in its exhibit G-2:

1. Count I, Section 1 violations

The government contends that M&D engaged in a variety of section 1 violations, including,

- a. failed to ensure that thirty four employees signed the attestation in section 1 of form I-9 (nos. 2, 15, 36, 41, 42, 61, 62, 67, 70, 71, 76, 77, 86, 119, 129, 133, 139, 144, 178, 185, 191, 200, 204, 211, 218, 235, 242, 252, 254, 255, 257, 259, 264, and 237),¹
- b. failed to ensure that sixty employees checked a box in section 1 of form I-9 (nos. 10, 11, 16, 17, 23, 25, 26, 31, 32, 38, 39, 41, 42, 43, 50, 53, 54, 57, 58, 63, 65, 66, 67, 70, 82, 83, 94, 105, 110, 112, 122, 125, 127, 129, 148, 154, 165, 177, 179, 184, 185, 194, 200, 205, 208, 214, 216, 217, 218, 220, 224, 227, 229, 231, 240, 242, 249, 254, 259, and 264),
- c. failed to ensure that three employees attested to only one status in section 1 of form I-9 (nos. 13, 183, and 260),
- d. failed to ensure that ten employees who attested to status as lawful permanent residents entered their respective alien numbers on the adjacent line (nos. 14, 76, 80, 85, 95, 133, 142, 230, 239, 277).

2. Count I, Section 2 violations

The government also pointed to section 2 violations, including that M&D,

¹ The names of the employees are set out in Appendix A.

- a. failed to complete section 2 of form I-9 properly (nos. 1, 2, 3, 4, 6-31, 33-37, 39-54, 56-61, 63-65, 67-74, 76, 78-90, 92-94, 96-105, 114, 116, 124, 125, 128-130, 132-34, 136, 139, 141, 144, 148-150, 152, 158, 162, 163, 165, 167, 170, 172, 174, 183, 184, 189-191, 193, 195, 196, 200, 206, 207, 209-213, 215, 216, 218-221, 224, 226, 227, 232-234, 236, 239, 240, 242, 244, 248, 249, 252, 256, 258, 261, 264, and 268).
- b. failed to sign section 2 of form I-9 (nos. 112, 114, 116-117, 119-120, 124-125, 128-130, 132-134, 136, 140-142, 145, 148-150, 152-154, 158-159, 166-168, 170, 172, 174-175, 193, 195, 200, 205-213, 215-218, 220-222, 224, 226-228, 230-237, 239, 240, 242, 244, 245, 248, 249, 252, 253, 254, 255, 256, 258, 261, 263, and 275).
- c. failed to record the issuing authority for a List B document (driver's license) (nos. 5, 62, 75, 107, 113, 117, 131, 135, 138, 140, 155, 156, 168, 188, 197, 198, 217, 222, 228, 251, and 257).
- d. failed to provide the document number for List A documents and List B and C documents (nos. 62, 91, 107, 117, 120, 123, 138, 140, 142, 146, 159, 166, 168, 197, 198, 222, 225, 228, 238, 253, 257, 259, 272, 275, and 276).
- e. failed to review both a List B and a List C document (nos. 5, 53, 55, 75, 95, 106, 108, 109, 110, 111, 112, 126, 145, 146, 166, 177, 178, 185, 186, 194, 202, 205, 208, 214, 225, 252, 254, 255, and 276).
- f. reviewed unacceptable documents or provided insufficient information about a document (nos. 115, 118, 126, 194, 180, 214, and 266).

Finally, ICE noted in addition that that numerous I-9 forms were not reviewed and verified within three business days of the individual's hire date.

3. Count II

As to Count II, ICE said it determined that I-9 forms were not prepared for eighty-seven employees by examining records identified as Wage Inquiry by Employer Number received from the Georgia Department of Labor. The Department identifies M&D by the Employer Number 57931022, and records the wages paid to each employee by the individual's social security number and an abbreviated surname or employee name. The records for the third and fourth quarters of 2009 and the first and second quarters of 2010 were the source for the names reflected in Count II. Because the Department keeps the wage records by social security numbers, the full names of the employees do not necessarily appear on the Wage Inquiry. Many of the employees are identified only by their social security numbers and a three-letter designation such as "GIB." The government points out that M&D's answer contested only a handful of these alleged violations.

The government pointed to a few instances in which M&D asserted that a partially identified individual named on Count II was the same person as an individual named in Count I or elsewhere in Count II. In all but one of these instances, however, the individuals had different

social security numbers. As to the exception, no. 22 (GIB) and no. 67 (SAN), ICE contended that although both GIB and SAN were paid under the same social security number, they appear in different quarters in the wage records and “two individuals may have used the same social security number during different quarters.”

The government’s motion finally takes preemptive aim at M&D’s affirmative defenses and asserts that all six should be stricken as unsupported by statute, regulation, case law, or evidence, because none is sufficient to preclude liability. The government points out that the Interim Guidelines² have the force of law, *citing United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 9-11 (2001),³ and have been publicly available since 1997, and says its matrix for penalties has been publicly available since 2009. In addition, ICE says the complaint alleges only substantive violations, so that no issue arises with respect to technical or procedural violations. Finally, ICE points out that the company’s so-called fourth, fifth, and sixth defenses are arguments respecting penalty issues and do not constitute defenses to liability.

4. Penalties

ICE concludes that penalties totaling \$332,813.25 should be imposed for the three hundred thirty-nine violations shown. ICE says it started with a baseline penalty of \$935 for each violation in accordance with internal agency guidelines based on the employer’s 84% error rate. It then aggravated the penalties by five percent for the seriousness of the violations not only because of their inherent seriousness, but also because more than a hundred I-9 forms were supposedly verified by a signature stamp on the same day, February 20, 2008, regardless of the wildly varying dates reflected in section 1 of the forms. The government also aggravated the penalties by another five percent based on the size of the employer, pointing out that the company had been in the business for more than twenty years, had more than four hundred

² The reference is to a Memorandum from Paul W. Virtue, then INS Acting Exec. Comm’r of Programs, Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines), available at 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997).

³ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders>.

employees over a three year period, a payroll of 4.3 million dollars, and a number of significant contracts. ICE treated the involvement of unauthorized workers and the lack of history of previous violations as neutral. Finally, the government says it mitigated the penalties by five percent based on the good faith criterion, and the net result is a reasonable and proportionate penalty that should not be disturbed. The final assessment was made at the rate of \$981.75 for each violation.

B. M&D's Response in Opposition

M&D vigorously opposes the motion and contends that there are triable issues of fact both as to the alleged violations and the penalties sought. The company's summary of the background of this case questions the government's methodology in selecting M&D for audit, and says that unless ICE investigated the background of the newspaper article, the government cannot justify pursuing a hearsay account in a newspaper while not pursuing a "tip" M&D gave opposing counsel about an alien smuggler. The company also complains at length about the government's unwillingness in settlement discussions to reduce the penalties to the extent M&D wanted.

M&D contends that there are genuine issues of material fact both as to liability and as to civil money penalties. M&D identifies five specific problems as examples of "some of the subject matter involving genuine issues of material fact." First, the company points first to the twenty-five allegations regarding employees whose employment ended prior to the audit. Second, M&D says that ICE failed to follow the Virtue Memorandum in assessing a penalty for Wallace Cannon, employee no. 12. The company notes that this individual's name appears on the NTPF and that M&D presented a corrected I-9 form for him on September 14, 2010. M&D says ICE nevertheless included his name on the NIF in violation of the Virtue Memorandum.

As a third factual issue, M&D complains that ICE failed to fully identify fifty-two individuals named in Count II, some of whom are identified only by three capital letters. The company says that despite its requests, ICE has produced no additional information about the names of these individuals. M&D says ICE could have had access to those names from IRS and the Georgia Department of Labor based on the social security numbers, but instead "arrogantly decided to leave it up to Respondent to do the work to 'figure out' those names." The company points to *United States v. Siwan & Sons, Inc.*, 10 OCAHO no. 1179 (2013), in which this forum declined to find a violation for failure to prepare an I-9 form for an unnamed, unknown person.

Fourth, M&D argues that the government failed to satisfy its burden of proof with respect to employees no. 22 (GIB) and no. 67 (SAN), and says one of the two should be removed because this is the same person, Grant Sanders Gibbs. The same social security number is used for this employee in the first and second quarters of 2010, but the name is shown as SAN in the first quarter and GIB in the second.

Finally, M&D urges with respect to I-9s that have as the only substantive violation a failure to provide the issuing authority for a driver's license, that *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 18-19 (2011), should be reconsidered and reversed. Nine of the violations in Count I involving the forms for employees identified as nos. 131, 135, 155, 156,

188, 197, 198, 251, and 272, reflect this error. M&D points out that *United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 233 (1994), a case relied upon in *Ketchikan*, was decided three years before the Virtue Memorandum issued, and that the Virtue Memorandum does not designate failure to enter the issuing authority for a document as a substantive violation.

M&D's response did not specifically focus on the penalty factors. Neither did it address the affirmative defenses the company raised in its answer, or point to evidence in support of those defenses. The company made no response to ICE's suggestion that the defenses should be stricken.

IV. EVIDENCE CONSIDERED

A. ICE's Exhibits

Exhibits accompanying ICE's motion include G-7)⁴ Georgia Secretary of State Business Registration (2 pp.); G-8) Atlanta Journal Constitution Article (3 pp.); G-9) Declaration of ICE Auditor Melinda Stephens (9 pp.); G-10) Virtue Memorandum (11 pp.); G-11) Second I-9 for W. Cannon; G- 12) Georgia DOL Wage Inquiry (42 pp.); G-13) 2013 Quarterly Tax Return (3 pp.), and G-22) I-9 Form for Rafael Lopez.

B. M&D's Exhibits

M&D's opposition was accompanied by exhibits R-15)⁵ Atlanta Journal Constitution Article (3 pp.); R-16) Notice of Technical or Procedural Failures, with I-9s (59 pp.); R-17) Notice of Suspect Documents (4 pp.); R-18) cover letter dated September 14, 2010 (2 pp.); R-19) Change to Notice of Inspection Results; and R-20) Notice of Intent to Fine (5 pp.).

V. WHETHER THE VIOLATIONS OCCURRED

As an initial matter, I reject M&D's assertion that ICE is barred from pursuing an investigation based on a newspaper article until it first investigates the article itself. No legal authority is cited in support of this curious proposition, and this office has no free-floating supervisory role over ICE's choices of which businesses it will inspect.

The first twenty-five violations M&D says present factual issues were dismissed in a separate order on January 28, 2014, so any issues as to these violations are no longer material to this case. The dismissed allegations involved the I-9s for nos. 121) Boozer, Michael L., 137) Buckner,

⁴ Government's exhibits G-1 through G-6 were previously provided with ICE's prehearing statement.

⁵ Exhibits R-1 through R-14 were previously provided with M&D's prehearing statement.

Jamitchell T., 143) Centeno, Manuel, 147) Collier, Khalif Waked, 151) Davis, Rodney, 157) Cuellar, Jose Efrain, 160) Driver, Kassian Montel, 161) Foster, Jr., Jacob, 169) Garcia, Benjamin F., 171) Garcia, Paulo, 173) Genaro, Cirilo Victoria, 176) Godwin, Armand Jarrod, 182) Gordillo, Orsa, 192) Henderson, Eddie, 199) Lassiter, Johnny, 201) Joya, Jose, 203) Johnson, Alexander, 223) Palacios, Erlin, 241) Rowe, Jeny L, 243) Sanchez, Benito, 246) Smith, Carlos Marrice, 247) Smith, Reginald Bernard, 250) Scott, Anthony Jerome, and 262) Tyner, Thomas Christopher. Inadvertently omitted from the motion and the order was employee no. 164, Alvin Franklin, as to whom the allegations will also be dismissed.

M&D takes issue with the appearance of the name Wallace Cannon (no. 12) on the list of substantive violations in Count I, and says the company corrected technical and procedural errors on Cannon's I-9 on September 14, 2010. And so it did. But the company does not acknowledge that there were two I-9s for Wallace Cannon, one of which had a technical violation but the other of which contained a substantive violation because Cannon failed to include the expiration date for his driver's license (exhibit G-11). That a particular I-9 form may contain a technical or procedural violation in any event has no effect on the government's ability to pursue a remedy for a substantive violation, even were both errors to appear on the same form. *See United States v. Super 8 Motel & Vilella Italian Rest.*, 10 OCAHO no. 1191, 6 (2013). The NTPF (R-16) contains a note expressly advising the company that,

Additional failures to meet the employment verification requirements of Section 274A(b) of the INA may have been discovered. These failures are not included in this notification and may result in the issuance of a Notice of Intent to Fine. If a Notice of Intent to Fine is issued, it will be served separately from this notification.

Liability is established for the substantive violation in the second I-9 for Wallace Cannon.

M&D cites *Siwan* to suggest that a violation may not be found for failure to present an I-9 for an individual whose whole name is not provided. But *Siwan* does not stand for the proposition that liability can never be found for a violation involving an individual whose last name is unknown or whose full name is not furnished, and there is no such rule. In *United States v. Symmetric Solutions, Inc.*, 10 OCAHO no. 1209, 12-13 (2014), for example, liability was found for sixty-six violations involving failure to prepare or present I-9 forms for individuals identified only by their first names and the designation LNU (last name unknown). The evidence showed that Symmetric paid most of its workforce in cash under the table and kept its payroll records in notebooks with handwritten entries containing only the first names of the employees. There was no reasonable way for ICE to ascertain the actual last names of these employees, and no way that the company should have escaped liability based on its own eccentric record-keeping system. In *Siwan*, in contrast, the status of one individual could not be ascertained because there were multiple employees with the same surname, and none of their names could be matched with any social security number in the company's payroll records. M&D complains here that ICE should have obtained the names of the employees from IRS or the Georgia DOL, but also says that "[a]s a final resort, Complainant could have even requested additional information, by subpoena, from Respondent." It appears that M&D is not in doubt as to the identities of virtually all these

employees, and no rationale is offered to show that any useful purpose would be served by having ICE subpoena the company in order to obtain and give back information already in M&D's hands. The company will be liable for these violations, with one exception.

While it is not at all uncommon for more than one person to have the same name, a social security number is a unique numerical identifier. *See Bower v. Roy*, 476 U.S. 693, 711 (1986). A wage earner is entitled to only one such number to serve as his or her individual taxpayer identification. 26 C.F.R. §§ 301.6109-1(a)(1)(ii),(b). No person should have more than one such number, *United States v. Occupational Res. Mgt., Inc.*, 10 OCAHO no. 1166, 20-21 (2013), and no two people should have the same number. I do not accept the government's hypothesis that GIB and SAN are two different individuals who were paid under the same social security number in two different quarters. Employees with similar names and different social security numbers are presumed, absent evidence to the contrary, to be different individuals. But when wages are paid to an individual under the same social security number in different quarters, the presumption, absent evidence to the contrary, is that this is the same employee, despite the different letter designations. I accept M&D's explanation that the individual in question is Grant Sanders Gibbs. One violation will be found for failure to present an I-9 for this individual, identified as both no. 22 (GIB) and no. 67 (SAN). A violation is found for employee no. 22, but no violation is found for employee no. 67.

Finally, M&D urges that there is a material issue with respect to nine allegations in Count I involving employees no. 131, 135, 155, 156, 188, 197, 198, 251, and 272. While there may be an issue with respect to these nine violations, that issue is not a factual one. Visual inspection of the nine I-9 forms in question reflects that in each instance no issuing authority is shown for the driver's license of that individual. M&D's argument raises an issue of law, not one of fact; that issue is whether *Ketchikan* should be reversed and the omission of the issuing authority held to be technical or procedural rather than substantive. The short answer is no. In denying a petition to review the *Ketchikan* decision, the Ninth Circuit, in *Ketchikan Drywall Services, Inc. v. Immigration and Customs Enforcement*, 725 F.3d 1103, 1114 (9th Cir. 2013), specifically addressed this question and found no error in holding the omission of the issuing authority to be a substantive violation, following *Candlelight Inn*. While it is correct, as M&D points out, that the Virtue Memorandum does not classify the failure to enter the issuing authority for a driver's license on the I-9 form as a substantive violation, it is also true that the Virtue Memorandum does not classify it as a technical or procedural violation either. The Memo itself makes clear that it is not intended to be exhaustive. ICE presented sufficient evidence to show that M&D is liable for these nine violations.

M&D did not furnish a factual statement with the affirmative defenses pleaded in its answer as is required by 28 C.F.R. § 68.9(c)(2), nor did it proffer evidence or otherwise take steps to provide specific facts or argument as to why any of the alleged defenses would insulate the company from liability for these violations. The company's response to ICE's motion did not address the government's assertion that the defenses should be stricken, and M&D appears to have waived the opportunity to support its defenses. The defenses are accordingly stricken.

VI. PENALTIES

Civil money penalties are assessed for paperwork violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom the violation occurred after September 29, 1999, is \$110, and the maximum penalty is \$1,100. The penalties available for the three hundred thirty-eight violations in this case range from a minimum of \$37,180 to a maximum of \$371,800. Five factors are set out in the governing statute, to which due consideration must be given in assessing the appropriate penalties. These include 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations by the employer. 8 U.S.C. § 1324a(e)(5). The statute does not require that equal weight be given to each factor. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

While M&D's response to ICE's motion for summary decision did not expressly address the penalty issue, the company's previous filings challenged ICE's methodology and characterized the resultant penalty as excessive. The standard by which M&D reaches the conclusion that the penalty is excessive is not entirely clear.⁶ As noted in *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998), however, a civil money penalty is excessive only when it is disproportionate to the gravity of the offense. *Cf. United States v. Emerson*, 107 F.3d 77, 81 (1st Cir. 1997) (touchstone is the proportion of the penalty amount to the particular offense). OCAHO case law is in accord with the view that proportionality is critical in setting penalties. *See United States v. Pegasus Restaurant, Inc.*, 10 OCAHO no. 1143, 7 (2012).

Generally speaking, when a civil money penalty or forfeiture falls below the statutory maximum, the party protesting it would have to make a very compelling case in order to prevail on a claim that it is constitutionally excessive. *See United States v. Chaplin's Inc.*, 646 F.3d 846, 852 (11th Cir. 2011). *See also CFTC v. Levy*, 541 F.3d 1102, 1112 (11th Cir. 2008) (penalty is not excessive when it falls within the range of permissible statutory and regulatory limits and is rationally related to the offense charged or to the need for deterrence). The *Levy* court referred with approval to language in *Monieson v. CFTC*, 996 F.2d 852, 862 (7th Cir. 1993) stating that when a penalty is within the limits set by the statute, the agency has made an allowable judgment.

M&D contends that the government is required to consider its ability to pay in setting a penalty. The governing statute, however, directs that due consideration be given to five enumerated factors that do not include an employer's ability to pay, and M&D cites no authority for the bald

⁶ Although our case law has sometimes questioned whether the Excessive Fines Clause has any application to civil money penalties, *see, e.g., United States v. Kurzon*, 4 OCAHO no. 637, 414, 422-23 (1994), the prevailing view since *Austin v. United States*, 509 U.S. 602, 607-08 (1993) is that the clause applies to civil, as well as criminal, penalties and forfeitures. Whether the protection of the Excessive Fines Clause is available to corporations, however, is not definitively resolved. *Browning-Ferris Inds. of Vermont, Inc. v. Kelco Disp. Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., dissenting and concurring).

assertion that such consideration is required.⁷ While 8 U.S.C. § 1324a(e)(3) does not rule out the consideration of other factors, *see Hernandez*, 8 OCAHO no. 1043 at 664, neither does the statute require consideration of the employer's ability to pay. The fact that some OCAHO cases have as a matter of discretion considered an employer's ability to pay, or some other nonstatutory factor, in assessing penalties in a particular case, *see, e.g., United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 9 (2014), *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6-7 (2010), does not mean that such consideration is a requirement at every stage or in every case. Thus while the Chief Administrative Officer found in *United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 730-31 (1989) that it was not an abuse of discretion for the Administrative Law Judge to consider the company's ability to pay as a subfactor in assessing the employer's size,⁸ nothing in that decision suggests that the Administrative Law Judge is required to do so. To the contrary, our case law has suggested that because an employer's ability to pay is a matter of equity, the factor can be raised only by a party with clean hands. *See United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1184 (1998).

As explained in *United States v. Amerigroup Illinois, Inc.*, 488 F. Supp. 2d 719, 747 (D. Ill. 2007), moreover, Congress has no obligation in setting statutory penalties "to make illegal behavior affordable, particularly for multiple violations," quoting *Phillips Randolph Enters., LLC v Rice Fields*, 2007 WL 129052 at *3 (N.D. Ill. Jan. 11, 2007). The *Amerigroup* court thus declined to undertake an economic analysis, and concluded that whether or not a penalty is excessive "should turn on the Defendant's conduct, not the state of his coffers." 488 F. Supp. 2d at 747. *See also, United States v. 817 N.E. 29th Drive, Wilton Manors*, 175 F.3d 1304, 1311 (11th Cir. 1999) (excessiveness is determined in relation to the characteristics of the offense itself, not those of the offender).

While there are some favorable factors for the company in this case, the government rightly distinguishes M&D from businesses involving "mom and pop" family restaurants or struggling start-up companies, and says M&D is more comparable in both size and number of violations to *Ketchikan*, where no adjustment was made to the penalty ICE proposed. The government's characterization of the violations as serious is also accurate, but seriousness may be evaluated on a continuum because not all violations are equally serious. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *Carter*, 7 OCAHO no. 931, 113, 169 (1997)). Here, the violations in Count II are more serious than those in Count I because failure to prepare and/or present I-9s completely subverts the purpose of the law. *United States v. Skydive Academy of Haw.*, 6 OCAHO no. 868, 235, 249 (1996) (citing *United States v. Wu*, 3 OCAHO no. 434, 424, 425 (1992) (modification by the CAHO)). *See also United States v. Platinum Builders of Cent.*

⁷ *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal citations and quotation marks omitted).

⁸ *But see United States v. Carter*, 7 OCAHO no. 931, 121, 160 (1997) (cautioning against confusing size with ability to pay). *Accord, United States v. Gasper*, 2 OCAHO no. 394, 757, 759 (1990) (ability to pay is not necessarily a factor to be considered as part of size).

Fla., Inc., 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Reyes*, 4 OCAHO no. 592 1, 10 (1994)).

ICE was unduly generous, however, in treating good faith as a favorable consideration in this case. Analysis of an employer's good faith will often focus first on whether or not the employer reasonably attempted to comply with its obligations under § 1324a prior to the issuance of the Notice of Inspection. *See, e.g., United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO). Review of the company's I-9 forms reflects what appears to be a wholesale execution by means of a rubber stamped signature in section 2 on February 20, 2008 of a large number of what must have been at the time otherwise blank I-9s. Visual inspection of these forms reflects that in most instances, no List A, List B, or List C documents are entered in section 2 and no start dates are identified. While many of the forms are undated in section 1, others show that section 1 was completed months or even years after section 2. It is difficult to avoid the inference that the forms were prepared in bulk in advance and used as needed for subsequent hiring. Not only does such conduct fail to reflect a reasonable attempt by the employer to comply with its obligations under § 1324a, the presigning of hundreds of I-9 forms in batches has been found to constitute "false attestation" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1546(b). *See Broussard-Wadkins v. Maples*, 895 F. Supp.2d 1159, 1204-05 (N.D. Ala. 2012).

Due consideration has been given to the Affidavits of Brent Sparkman and Mike Weldon, as well as to M&D's 2009 tax return. While I credit that the company has experienced setbacks during the recent recession and that it operates in a difficult environment, these documents are not probative of an inability to pay the penalty proposed. Notwithstanding that fact, consideration of the record as a whole persuades me that the principle of proportionality would be better served by adjusting the penalties to an amount that is still near the higher end of the mid-range, but somewhat lower than the \$981.75 sought by the government. Penalties so close to the maximum should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

For the two hundred fifty-two defective I-9s in Count I the penalties will be assessed at \$650 for each violation. For the eighty-six missing I-9s in Count II, the penalties will be \$750 for each violation. The penalties total \$228,300.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. M&D Masonry, Inc. was incorporated in Georgia by Mike Weldon and his brother David Weldon in 1992, and has its principal place of business in Barnesville, Georgia.
2. M&D Masonry, Inc. is a family business that provides masonry contractor services throughout the state of Georgia.

3. A newspaper article in the Atlanta Journal Constitution on April 30, 2010 quoted a hiring foreman for M&D as saying that the company was employing workers on a job at the airport knowing they lacked valid employment authorization.
4. On May 7, 2010 the United States Department of Homeland Security, Immigration and Customs Enforcement served M&D Masonry, Inc. with a Notice of Inspection (NOI).
5. United States Department of Homeland Security, Immigration and Customs Enforcement sought I-9 forms for M&D Masonry, Inc.'s current and terminated employees for the period May 7, 2007 until May 7, 2010, as well as for employment records, payroll data, wage and hour reports, and other information.
6. M&D Masonry, Inc. provided three hundred forty-two I-9 forms to the United States Department of Homeland Security, Immigration and Customs Enforcement, together with other documents.
7. The United States Department of Homeland Security, Immigration and Customs Enforcement issued M&D Masonry, Inc. a Notice of Technical and Procedural Failures on August 31, 2010, together with a Notice of Suspect Documents (NSD).
8. M&D Masonry, Inc. presented fifty-six corrected forms to the United States Department of Homeland Security, Immigration and Customs Enforcement on September 14, 2010 and also advised ICE that forty-three of the individuals on the NSD no longer worked for the company.
9. The United States Department of Homeland Security, Immigration and Customs Enforcement issued M&D Masonry, Inc. a Change to Notice of Inspection Results on October 13, 2010
10. The United States Department of Homeland Security, Immigration and Customs Enforcement served M&D Masonry, Inc. with a Notice of Intent to Fine (NIF) on May 17, 2012.
11. M&D Masonry, Inc. filed a Request for Hearing on June 12, 2012.
12. M&D Masonry, Inc., hired two hundred fifty two individuals named in Count I of its complaint and either failed to ensure that the employee properly completed section 1 of the I-9 form, or failed itself to complete section 2 or section 3 of the form.
13. M&D Masonry, Inc. hired eighty-six individuals named in Count II for whom it failed to present I-9 forms upon request.
14. The individuals identified in Count II of the complaint as employee no. 22 (GIB) and employee no. 67 (SAN) are the same person, Grant Sanders Gibson.

B. Conclusions of Law

1. M&D Masonry, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).
2. M&D Masonry, Inc. filed a timely Request for Hearing.
3. All conditions precedent to the institution of this proceeding have been satisfied.
4. M&D Masonry, Inc., is liable for three hundred thirty-eight violations of 8 U.S.C. § 1324a(1)(B).
5. In assessing an appropriate penalty for violations of 8 U.S.C. § 1324a(1)(B), the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5).
6. In assessing an appropriate penalty for violations of 8 U.S.C. § 1324a(1)(B), it is not required that equal weight be given to each of the enumerated statutory factors, nor is consideration of additional factors precluded. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).
7. Good faith is shown when an employer makes an honest effort to ascertain what its legal obligations are and to conform its conduct to them. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (citing *United States v. Riverboat Delta King, Inc.*, 5 OCAHO no. 738, 126, 130 (1995)).
8. Failure to prepare and/or present an I-9 is one of the most serious paperwork violations. *See United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Reyes*, 4 OCAHO no. 592 1, 10 (1994)).
9. A civil money penalty is excessive when it is disproportionate to the gravity of the offense. *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998).
10. Proportionality is critical in setting penalties. *See United States v. Pegasus Restaurant, Inc.*, 10 OCAHO no. 1143, 7 (2012).
11. The seriousness of violations may be evaluated on a continuum and not all violations are equally serious. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 169 (1997)).
12. Penalties at or near to the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

M&D is liable for three hundred thirty-eight violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay civil money penalties in the total amount of \$228,300.

So ordered.

Dated and entered this 11th day of March, 2014.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Chief Administrative Hearing Officer (CAHO) or the Attorney General.

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.

| APPENDIX TO COUNT I | | | |
|----------------------------|-------------------------|-------------------------|-----------------------------|
| No. | Employee | <i>Judgment for ICE</i> | <i>Judgment for M&D</i> |
| 1 | Banknell, Robert R. | Violation as charged | |
| 2 | Ben, Allen G. | Violation as charged | |
| 3 | Blash, Carlos R. | Violation as charged | |
| 4 | Blasingame, Alden R. | Violation as charged | |
| 5 | Botello, Humberto | Violation as charged | |
| 6 | Bridges, Jordan R. | Violation as charged | |
| 7 | Beyan, Luke Ray | Violation as charged | |
| 8 | Burke III, Mason | Violation as charged | |
| 9 | Campbell, Derek | Violation as charged | |
| 10 | Campbell, Joshua | Violation as charged | |
| 11 | Campbell, Tatus T. | Violation as charged | |
| 12 | Cannon, Wallace B. | Violation as charged | |
| 13 | Jose, Juan Carlos | Violation as charged | |
| 14 | Castaneda, Jose A. | Violation as charged | |
| 15 | Clayton, Jr. Carlton | Violation as charged | |
| 16 | Covarrabia, Marcos | Violation as charged | |
| 17 | Dewberry, Gordon B. | Violation as charged | |
| 18 | Dillard, Carl E. | Violation as charged | |
| 19 | Dixon, Santonio D. | Violation as charged | |
| 20 | Davenport, Alexander D. | Violation as charged | |
| 21 | Contreras, Elias Z. | Violation as charged | |
| 22 | De La Rosa, Adolfo | Violation as charged | |
| 23 | Dean, Clemont | Violation as charged | |
| 24 | Denton, Christopher D. | Violation as charged | |
| 25 | Deltoro Valdez, Alfredo | Violation as charged | |
| 26 | Diaz, Leyser | Violation as charged | |
| 27 | Hector, Diaz | Violation as charged | |
| 28 | Ellis, Anthony L. | Violation as charged | |
| 29 | Freeman, Robert | Violation as charged | |
| 30 | Gantt, Charles Wm. | Violation as charged | |
| 31 | Garcia, Misael S. | Violation as charged | |
| 32 | Garcia, Juan Manuel | Violation as charged | |
| 33 | Gomez, Juan Jose | Violation as charged | |
| 34 | Gonzales, Fabian | Violation as charged | |
| 35 | Green, Anthony S. | Violation as charged | |
| 36 | Griner, Anthony | Violation as charged | |
| 37 | Gonzalez, Julio C. | Violation as charged | |
| 38 | Gutierrez, Jose G. | Violation as charged | |
| 39 | Guzman, Ernesto | Violation as charged | |
| 40 | Hart, Roger S. | Violation as charged | |
| 41 | Hernandez, Jose C. | Violation as charged | |
| 42 | Hernandez, Benito J. | Violation as charged | |
| 43 | Hoskins, Tyroxle | Violation as charged | |

| APPENDIX TO COUNT I | | | |
|----------------------------|---------------------------|-------------------------|-----------------------------|
| No. | Employee | <i>Judgment for ICE</i> | <i>Judgment for M&D</i> |
| 44 | Huerta, Hector | Violation as charged | |
| 45 | Huerta, Juan A. | Violation as charged | |
| 46 | Huerta, Aniceto | Violation as charged | |
| 47 | Huezo, Jabriel | Violation as charged | |
| 48 | Jackson, Demetran | Violation as charged | |
| 49 | Jackson, Eugene | Violation as charged | |
| 50 | Jimenez, Rafael H. | Violation as charged | |
| 51 | Lawrence, Michael L. | Violation as charged | |
| 52 | Lewis, Michael D. | Violation as charged | |
| 53 | Lopez, Rafael | Violation as charged | |
| 54 | Lopez, Manuel J. | Violation as charged | |
| 55 | Lundy, William C. | Violation as charged | |
| 56 | Mach, Arteminus | Violation as charged | |
| 57 | Mancia, Pedro | Violation as charged | |
| 58 | Martinez, Jose C. | Violation as charged | |
| 59 | Luna, Fidel | Violation as charged | |
| 60 | Lundy, Arthur L. | Violation as charged | |
| 61 | Mathis, Edward Jr. | Violation as charged | |
| 62 | Maze, Travis J. | Violation as charged | |
| 63 | McCrary, Barbara B. | Violation as charged | |
| 64 | McLendon, Sr., Michael | Violation as charged | |
| 65 | Meadows, Kendrick A. | Violation as charged | |
| 66 | Medina, Bertoldino | Violation as charged | |
| 67 | Mims, Quinton L. | Violation as charged | |
| 68 | Abenailles, Morales B. | Violation as charged | |
| 69 | Nelson, Malcom | Violation as charged | |
| 70 | Olivares, Eduardo Galicia | Violation as charged | |
| 71 | Patterson, Charles E. | Violation as charged | |
| 72 | Perete, Jose Luis H. | Violation as charged | |
| 73 | Pippin, Walter D. | Violation as charged | |
| 74 | Reynoso, Pascual R. | Violation as charged | |
| 75 | Rhodes, Shawn T. | Violation as charged | |
| 76 | Raul, Roblero | Violation as charged | |
| 77 | Reyes, Orlando S. | Violation as charged | |
| 78 | Robinson, Carlos D. | Violation as charged | |
| 79 | Rivers, Earl | Violation as charged | |
| 80 | Rodriguez, Carlos | Violation as charged | |
| 81 | Rogers, Charlie C. | Violation as charged | |
| 82 | Romero, Irvin | Violation as charged | |
| 83 | Rosas, Robin | Violation as charged | |
| 84 | Soloman, Charleston | Violation as charged | |
| 85 | Socop, Francisco | Violation as charged | |
| 86 | Reyes, Salvador Sanchez | Violation as charged | |

| APPENDIX TO COUNT I | | | |
|----------------------------|--------------------------|-------------------------|-----------------------------|
| No. | Employee | <i>Judgment for ICE</i> | <i>Judgment for M&D</i> |
| 87 | Simmions, Gary | Violation as charged | |
| 88 | Tanner, Dean Allen | Violation as charged | |
| 89 | Sullivan, Leonard E. | Violation as charged | |
| 90 | Strolberg, Shawn F. | Violation as charged | |
| 91 | Spines, Jeffery | Violation as charged | |
| 92 | Spikes, Gary Jr. | Violation as charged | |
| 93 | Thomas, Lynwold E. | Violation as charged | |
| 94 | Torres-Salazar, Sergio | Violation as charged | |
| 95 | Trochez, Angel Rene | Violation as charged | |
| 96 | Colon, Tomas Vega | Violation as charged | |
| 97 | Ward, Manzie L. | Violation as charged | |
| 98 | Weaver, Sr., Tony L. | Violation as charged | |
| 99 | Widener, Jeffrey D. | Violation as charged | |
| 100 | Williams, Mickel L. | Violation as charged | |
| 101 | Wright, Kenneth E. | Violation as charged | |
| 102 | Wright, Robert D. | Violation as charged | |
| 103 | Zepeda, Fabian | Violation as charged | |
| 104 | Lopez, Rafael | Violation as charged | |
| 105 | Gonzalez Guillen, Julio | Violation as charged | |
| 106 | Gonzalez, Daniel | Violation as charged | |
| 107 | Weldon, Josh D. | Violation as charged | |
| 108 | Alvarado, Roger | Violation as charged | |
| 109 | Camona, Jose A. | Violation as charged | |
| 110 | Lopez, Jose Alberto | Violation as charged | |
| 111 | Moreno, Alfredo Avalos | Violation as charged | |
| 112 | Becerril, Marcelo | Violation as charged | |
| 113 | Castillo, Capetillo A. | Violation as charged | |
| 114 | Andrews, David K. | Violation as charged | |
| 115 | Martinez, Arellano A. | Violation as charged | |
| 116 | Arellaho, Jesus Arambula | Violation as charged | |
| 117 | Arellano, Juan Carlos | Violation as charged | |
| 118 | Martinez, Arallano Cruz | Violation as charged | |
| 119 | Arellano, Mario | Violation as charged | |
| 120 | Avila, Antonio | Violation as charged | |
| 121 | Boozer, Michael L. | | Dismissed by Order, 1/28/14 |
| 122 | Brown, Afdosta L. | Violation as charged | |
| 123 | Brown, Armon Laver | Violation as charged | |
| 124 | Armstead, Ira F. | Violation as charged | |
| 125 | Arreola, Efrain | Violation as charged | |
| 126 | Alvarez, Jose D. | Violation as charged | |
| 127 | Ayers, Steve Harris | Violation as charged | |
| 128 | Barrios, Alonso | Violation as charged | |
| 129 | Bartolon, Lerdin | Violation as charged | |

| APPENDIX TO COUNT I | | | |
|----------------------------|--------------------------|-------------------------|---|
| No. | Employee | Judgment for ICE | Judgment for M&D |
| 130 | Baughns, Antonio | Violation as charged | |
| 131 | Beaty, Bobby A | Violation as charged | |
| 132 | Becks, Gary Lee Jr. | Violation as charged | |
| 133 | Lopez, Edwin | Violation as charged | |
| 134 | Brantly, Quincy | Violation as charged | |
| 135 | Brantly, Leslie | Violation as charged | |
| 136 | Brown, Joseph | Violation as charged | |
| 137 | Buckner, Jamitchell T. | | Dismissed by Order, 1/28/14 |
| 138 | Butts, Clifford Jwaski | Violation as charged | |
| 139 | Calloway, Ray | Violation as charged | |
| 140 | Carter, Michael | Violation as charged | |
| 141 | Carr, Levi | Violation as charged | |
| 142 | Castillo, Miguel | Violation as charged | |
| 143 | Centeno, Manuel | | Dismissed by Order, 1/28/14 |
| 144 | Chavel, Andres Dominguez | Violation as charged | |
| 145 | Cortez, Fredi | Violation as charged | |
| 146 | Davis II, James Earl | Violation as charged | |
| 147 | Collier, Khalif Waked | | Dismissed by Order, 1/28/14 |
| 148 | Cantreras, Horacio | Violation as charged | |
| 149 | Cooper, Bobby Wayne | Violation as charged | |
| 150 | Cordova, Garcia Rociel | Violation as charged | |
| 151 | Davis, Rodney | | Dismissed by Order, 1/28/14 |
| 152 | De La Rosa, Hobet | Violation as charged | |
| 153 | Deverger, Ezekial | Violation as charged | |
| 154 | Elble, Steven R. | Violation as charged | |
| 155 | Evans, David Lee | Violation as charged | |
| 156 | Crisp, James K. | Violation as charged | |
| 157 | Cuellar, Jose Efrain | | Dismissed by Order, 1/28/14 |
| 158 | Cummins, Dennis Lee | Violation as charged | |
| 159 | Cuprill, Harold J. Velez | | |
| 160 | Driver, Kassian Montel | | Dismissed by Order, 1/28/14 |
| 161 | Foster Jr., Jacob | | Dismissed by Order, 1/28/14 |
| 162 | Fowler, Larry J. | Violation as charged | |
| 163 | Freeman, Dave Jr. | Violation as charged | |
| 164 | Franklin, Alvin | | Inadvertently omitted from order of 1/28/14 and dismissed <i>nuc pro tunc</i> . |
| 165 | Barrera, Fuentes Luis | Violation as charged | |
| 166 | Fuller, Larry | Violation as charged | |
| 167 | Funk, Robert S. | Violation as charged | |
| 168 | Gainer, Raford | Violation as charged | |
| 169 | Garcia, Benjamin F. | | Dismissed by Order, 1/28/14 |
| 170 | Garcia, Aurelio | Violation as charged | |

| APPENDIX TO COUNT I | | | |
|----------------------------|----------------------------|-------------------------|-----------------------------|
| No. | Employee | <i>Judgment for ICE</i> | <i>Judgment for M&D</i> |
| 171 | Garcia, Paulo | | Dismissed by Order, 1/28/14 |
| 172 | Garcia, Ramon | Violation as charged | |
| 173 | Genaro, Cirilo Victoria | | Dismissed by Order, 1/28/14 |
| 174 | Gatling Jr., Leonard | Violation as charged | |
| 175 | Garcia, Victor | Violation as charged | |
| 176 | Godwin, Armand Jarrod | | Dismissed by Order, 1/28/14 |
| 177 | Gomes, Javier | Violation as charged | |
| 178 | Gomez, Jeronimo M. | Violation as charged | |
| 179 | Gomez, Walter | Violation as charged | |
| 180 | Gonzalez, German | Violation as charged | |
| 181 | Gonzales, Manuel | Violation as charged | |
| 182 | Gordillo, Orsa | | Dismissed by Order, 1/28/14 |
| 183 | Olivares-Guerrero, Gonzalo | Violation as charged | |
| 184 | Gurley, Nathan | Violation as charged | |
| 185 | Gutierrez, Eduardo | Violation as charged | |
| 186 | Haman, Jacob Lamar | Violation as charged | |
| 187 | Harp, Charles | Violation as charged | |
| 188 | Harris, Robert J. | Violation as charged | |
| 189 | Harvey, Alvin | Violation as charged | |
| 190 | Haslem, Edward | Violation as charged | |
| 191 | Haynes, Jimmy L. | Violation as charged | |
| 192 | Henderson, Eddie | | Dismissed by Order, 1/28/14 |
| 193 | Hernandez, Alfredo | Violation as charged | |
| 194 | Hernandez, Arturo Q. | Violation as charged | |
| 195 | Howard, Benjamin E. | Violation as charged | |
| 196 | Jackson, Alvin | Violation as charged | |
| 197 | Jackson, Betty | Violation as charged | |
| 198 | Huff, Carl | Violation as charged | |
| 199 | Lassiter, Johnny | | Dismissed by Order, 1/28/14 |
| 200 | Lassiter, David | Violation as charged | |
| 201 | Joya, Jose | | Dismissed by Order, 1/28/14 |
| 202 | Landreth, Kyle | Violation as charged | |
| 203 | Johnson, Alexander | | Dismissed by Order, 1/28/14 |
| 204 | Loomis, Christopher | Violation as charged | |
| 205 | Lopez, Alberto Jose | Violation as charged | |
| 206 | Martin, Charles D. | Violation as charged | |
| 207 | Martin, King | Violation as charged | |
| 208 | Martinez, Andre | Violation as charged | |
| 209 | Martinez, Juan R. | Violation as charged | |
| 210 | McCrary, Keith Wm. | Violation as charged | |
| 211 | Miller, Terry | Violation as charged | |
| 212 | Moore, William Clinton Jr. | Violation as charged | |
| 213 | Morales Chavez, Alejandro | Violation as charged | |

| APPENDIX TO COUNT I | | | |
|----------------------------|----------------------------|-------------------------|-----------------------------|
| No. | Employee | Judgment for ICE | Judgment for M&D |
| 214 | Moreno, Fidencio | Violation as charged | |
| 215 | Medina, Pedro | Violation as charged | |
| 216 | Mejia, Dennis | Violation as charged | |
| 217 | Reyes, Pablo | Violation as charged | |
| 218 | Moreno Gonzalez, Fidencio | Violation as charged | |
| 219 | Moye, Henry | Violation as charged | |
| 220 | Myrick, Jonathan | Violation as charged | |
| 221 | Neal, Ernest | Violation as charged | |
| 222 | O'Connor, Sean M. | Violation as charged | |
| 223 | Palacios, Erlin | | Dismissed by Order, 1/28/14 |
| 224 | Paredes, Pascual | Violation as charged | |
| 225 | Penamon, Rodney | Violation as charged | |
| 226 | Pavon, Roberto | Violation as charged | |
| 227 | Perez-Ramirez, Omar | Violation as charged | |
| 228 | Phillips, Tommy Lucius Sr. | Violation as charged | |
| 229 | Pineda, Gilberto | Violation as charged | |
| 230 | Pintor, Juan | Violation as charged | |
| 231 | Ramos, Jesus | Violation as charged | |
| 232 | Ray, Glenn | Violation as charged | |
| 233 | Reese, Elidan | Violation as charged | |
| 234 | Reid, Tony Lamar | Violation as charged | |
| 235 | Reyes-Tapia, Efren | Violation as charged | |
| 236 | Rodriguez, Andrew | Violation as charged | |
| 237 | Rivera, Reynau Vazaquez | Violation as charged | |
| 238 | Rios, Juan | Violation as charged | |
| 239 | Rincon, Nicolas | Violation as charged | |
| 240 | Rodriguez, Ruben | Violation as charged | |
| 241 | Rowe, Jeny L | | Dismissed by Order, 1/28/14 |
| 242 | Ruiz, Rolando | Violation as charged | |
| 243 | Sanchez, Benito | | Dismissed by Order, 1/28/14 |
| 244 | Smith, Lawrence | Violation as charged | |
| 245 | Sosa, Walter | Violation as charged | |
| 246 | Smith, Carlos Marrice | | Dismissed by Order, 1/28/14 |
| 247 | Smith, Reginald Bernard | | Dismissed by Order, 1/28/14 |
| 248 | Smith, Joshua L. | Violation as charged | |
| 249 | Sanchez, Jorge A | Violation as charged | |
| 250 | Scott, Anthony Jerome | | Dismissed by Order, 1/28/14 |
| 251 | Sims, Maryian L. | Violation as charged | |
| 252 | Savage, Jerry | Violation as charged | |
| 253 | Thornton, Timothy Lee | Violation as charged | |
| 254 | Taylor, Marcus A | Violation as charged | |
| 255 | Harvey, Taylor Jr. | Violation as charged | |
| 256 | Suarez, Jesus | Violation as charged | |

| APPENDIX TO COUNT I | | | |
|----------------------------|---------------------------|-------------------------|-----------------------------|
| No. | Employee | <i>Judgment for ICE</i> | <i>Judgment for M&D</i> |
| 257 | Story, Kyle Kenneth | Violation as charged | |
| 258 | Tillman, Robert | Violation as charged | |
| 259 | Torres, Salvador | Violation as charged | |
| 260 | Troutman, Abraham | Violation as charged | |
| 261 | Jaquez, Lois Antonio | Violation as charged | |
| 262 | Tyner, Thomas Christopher | | Dismissed by Order, 1/28/14 |
| 263 | Vargas, Jose | Violation as charged | |
| 264 | Vasquez, Miguel A | Violation as charged | |
| 265 | Vasquez, Wilfreolo | Violation as charged | |
| 266 | Vega, Sergio Garcia | Violation as charged | |
| 267 | Velazquez, Jose Luis | Violation as charged | |
| 268 | Wade K? George | Violation as charged | |
| 269 | Walden, Douglas Bernard | Violation as charged | |
| 270 | Weldon, Jacob A | Violation as charged | |
| 271 | Weldon Jr., Michael E. | Violation as charged | |
| 272 | Whittley, Troy A | Violation as charged | |
| 273 | Williams, Finley L | Violation as charged | |
| 274 | Woodring, Gary Lee | Violation as charged | |
| 275 | Wright, Howard | Violation as charged | |
| 276 | Young, Lazarus James | Violation as charged | |
| 277 | Zuarez, Paublino | Violation as charged | |

| APPENDIX TO COUNT II | | | |
|-----------------------------|--------------------------------------|-------------------------|-----------------------------|
| No. | Employee | <i>Judgment for ICE</i> | <i>Judgment for M&D</i> |
| 1 | ALB | Violation as charged | |
| 2 | ALC | Violation as charged | |
| 3 | BAN | Violation as charged | |
| 4 | BASTIDA, Fernando | Violation as charged | |
| 5 | BLAKE, George Melvin | Violation as charged | |
| 6 | BLA | Violation as charged | |
| 7 | BON | Violation as charged | |
| 8 | BRY | Violation as charged | |
| 9 | BYR | Violation as charged | |
| 10 | CAM | Violation as charged | |
| 11 | CARTMELL, Richard L | Violation as charged | |
| 12 | CAR | Violation as charged | |
| 13 | COL | Violation as charged | |
| 14 | COLVIN, Michael J | Violation as charged | |
| 15 | COV | Violation as charged | |
| 16 | DEL CID, Moris Oval | Violation as charged | |
| 17 | FINCHER, Jesse Lee | Violation as charged | |
| 18 | FLE | Violation as charged | |
| 19 | FUR | Violation as charged | |
| 20 | GAR | Violation as charged | |
| 21 | GAR | Violation as charged | |
| 22 | GIB | Violation as charged | |
| 23 | GONZALEZ, Antonio S | Violation as charged | |
| 24 | GRA | Violation as charged | |
| 25 | GRE | Violation as charged | |
| 26 | GREGORY, Charles | Violation as charged | |
| 27 | GUERRERO, Fidel | Violation as charged | |
| 28 | HAR | Violation as charged | |
| 29 | HER | Violation as charged | |
| 30 | HERNANDEZ, Ildefonso | Violation as charged | |
| 31 | HER | Violation as charged | |
| 32 | HER | Violation as charged | |
| 33 | HERNANDEZ, Julio Cesar | Violation as charged | |
| 34 | HERNANDEZ, Rigoberto Hernandez | Violation as charged | |
| 35 | HES | Violation as charged | |
| 36 | HUF | Violation as charged | |
| 37 | JAC | Violation as charged | |
| 38 | JACKSON, Kenneth | Violation as charged | |
| 39 | JEN | Violation as charged | |
| 40 | JIMENEZ-Gonzalez, Reynaldo Dagoberto | Violation as charged | |
| 41 | JOY | Violation as charged | |

| APPENDIX TO COUNT II | | | |
|-----------------------------|----------------------------|-------------------------|-----------------------------|
| No. | Employee | Judgment for ICE | Judgment for M&D |
| 42 | JOYA, Jose Luis | Violation as charged | |
| 43 | LOP | Violation as charged | |
| 44 | LOREDO, Adan | Violation as charged | |
| 45 | MAJ | Violation as charged | |
| 46 | MANNING, Norman Tilman | Violation as charged | |
| 47 | MIL | Violation as charged | |
| 48 | MOORE, Brian A | Violation as charged | |
| 49 | OLIVIAS, Ernesto Vega | Violation as charged | |
| 50 | PAR | Violation as charged | |
| 51 | POL | Violation as charged | |
| 52 | POW | Violation as charged | |
| 53 | REE | Violation as charged | |
| 54 | REE | Violation as charged | |
| 55 | RESENDIZ, Miguel | Violation as charged | |
| 56 | RICHARD, Paul | Violation as charged | |
| 57 | ROB | Violation as charged | |
| 58 | ROB | Violation as charged | |
| 59 | ROD | Violation as charged | |
| 60 | ROG | Violation as charged | |
| 61 | ROJ | Violation as charged | |
| 62 | ROSALES-ZUNIGA, Estepan | Violation as charged | |
| 63 | RUIZ, Jose R. Negrete | Violation as charged | |
| 64 | SALINAS, Ruben | Violation as charged | |
| 65 | SANCHEZ, Salvador | Violation as charged | |
| 66 | SAN | Violation as charged | |
| 67 | SAN | | No violation - Duplicate |
| 68 | SCO | Violation as charged | |
| 69 | SKE | Violation as charged | |
| 70 | SMITH, Charles Scott | Violation as charged | |
| 71 | SMI | Violation as charged | |
| 72 | THI | Violation as charged | |
| 73 | TRO | Violation as charged | |
| 74 | VEL | Violation as charged | |
| 75 | VELAZQUEZ, Dagoberto | Violation as charged | |
| 76 | VICTORIA, Milton | Violation as charged | |
| 77 | WAL | Violation as charged | |
| 78 | WAR | Violation as charged | |
| 79 | WEBB, Robert J. | Violation as charged | |
| 80 | WELDON, Michael Elwin | Violation as charged | |
| 81 | WELDON, David Wayne | Violation as charged | |
| 82 | WELDON, Jr. Kenneth | Violation as charged | |

| APPENDIX TO COUNT II | | | |
|-----------------------------|---------------------|-------------------------|-----------------------------|
| No. | Employee | <i>Judgment for ICE</i> | <i>Judgment for M&D</i> |
| 83 | WELDON, Marcus Kyle | Violation as charged | |
| 84 | WIL | Violation as charged | |
| 85 | WIL | Violation as charged | |
| 86 | WRIGHT, Roosevelt | Violation as charged | |
| 87 | ZACAZAR, Pedro | Violation as charged | |